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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 715

SCHLEY BROWN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In The

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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To: *The Honorable The Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of The United States.*

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered November 29, 1956, affirming the judgment of conviction

that was entered by the United States District Court for the District of Columbia against the petitioner for violation of the abortion statute. (67 Stat. 93, Ch. 159 sec. 203, D. C. Code, Supp. IV (1955) Section 22-201).

OPINIONS BELOW

There was no opinion in the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals rendered November 29, 1956, is not yet reported but is contained in the certified transcript of record submitted herewith and is appended to this petition. (R. 140)

On December 14, 1956, the petitioner filed a petition in the Court of Appeals for a rehearing en banc. (R. 142) This petition was denied by the Court of Appeals on December 26, 1956. (R. 152)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered December 14, 1956. (R. 143)

The petition for re-hearing (R. 142) was denied December 26, 1956. (R. 152)

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37 (b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. In a trial upon an indictment that charges the violation of an abortion statute by the sole method of procuring or producing an abortion, is it a denial of due process of law for the court to instruct the jury that a guilty verdict could be returned if they found that the accused had attempted to procure or produce an abortion, where: (1) the attempt is another method of violating the statute; and (2) where the indictment did not charge an attempt to procure

or produce an abortion; and, (3) where there was no evidence to support such an instruction.

2. In a prosecution for the commission of an abortion, have the rights of an accused to a fair and impartial trial and to due process of law been prejudiced, where the court admits into evidence testimony that the accused had entered into an agreement with others whereby the accused was to send patients to a house, if the nature of the agreement is indefinite and if the evidence has no probative value.

STATUTES INVOLVED

Title 22, Section 201, D. C. Code, 1951 Edition, Supp. IV. (1955):

> "Whoever, by means of any instrument medicine, drug, or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder." (Mar. 3, 1901, 31 Stat. 1322, ch. 854, Sec. 809; June 29, 1953, 67 Stat. 93, ch. 159 Sec. 203)

UNITED STATES CONSTITUTION

Fifth Amendment to the Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime unless a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor

be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The petitioner, Schley Brown, was charged in a one count indictment with that on or about September 1, 1955, he procured or produced an abortion and miscarriage of one Sylvia J. Stephenson.[1] (R. 1) He was arraigned in the United States District Court for the District of Columbia, and pleaded not guilty. (R. 2)

The charge against the petitioner was tried by a jury in the United States District Court for the District of Columbia. (R. 6) The petitioner's defense was that he did not commit the alleged offense and that at the time of the alleged commission thereof he was not in Washington, D. C. (R. 111-119) The two principal witnesses called by the government to prove the charge were: Miss Sylvia J. Stephenson, the complainant, and her friend, one Arthur Ted Leon.[2]

During the course of their testimony, these two witnesses related in substance the following facts concerning the alleged offense: In the month of June, 1955, Miss Stephenson said that she failed to have her regular monthly menstrual period. (R. 8) After again missing her menses in July, she contacted Mr. Leon; they discussed the matter and it was decided between them to seek the advice of a doctor. An appointment was made with a Dr. Robert Syme of Alexandria, Virginia.

In the early part of August, upon her second visit to Dr. Syme, he advised her that she was two months pregnant. (R. 31)

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[1] Violation or 67 Stat. 93, Ch. 159, Section 203, D. C. Code Supp. IV (1955) Sec. 22-201.

[2] It was established at the trial that Miss Stephenson and Mr. Leon had had an affair that had lasted for a time until May, 1955.

The further testimony was that on the morning of August 27, 1955, Miss Stephenson and Mr. Leon went to petitioner's office. (R. 31) Mr. Leon said that after arriving at the petitioner's office, he went into the petitioner's private office and there they had a short conversation in which he asked the petitioner to perform an abortion on Miss Stephenson; to which according to him, the petitioner agreed, and said that it would cost $300.00 Allegedly, the petitioner also told Mr. Leon that for $50.00 extra Miss Stephenson could go to a home in Georgetown and wait for the operation to take effect and there recuperate for a few days.

Mr. Leon and Miss Stephenson testified that on September 1, 1955, they went to a bank in Washington, D. C., and borrowed about $375.00. They said that afterwards an appointment was made to see the petitioner at his office at 7:00 p.m., that evening. (September 1, 1955) They testified that at the keeping of this appointment the petitioner and Miss Stephenson went into a private room. (R. 16) There, she said, the petitioner painted her uterus with iodine and thereafter squeezed a paste into her after which she was given a shot of penicillin. (R. 18) Mr. Leon said he paid the petitioner $300.00 and they then left his office.

Miss Stephenson and Mr. Leon said they went directly from the petitioner's office to Mr. Leon's apartment in Arlington, Virginia. Miss Stephenson remained there over night. On the next day, the 2nd of September, 1955, she said she began to have pains in her abdomen. At about 9:00 p.m., that evening, the pains became sharper and she fainted. The witness Leon testified that she then aborted. Her description was that she felt a feeling of relief. She later regained consciousness, at which time she noticed that the pain had ceased. She said that she felt fine but that there was quite a bit of bleeding from the uterus, and that in addition to the blood, she also passed "tissue of some sort." (R. 18-24) She said that she remained at

Mr. Leon's apartment until the morning of September 3rd. (R. 24)

After Mr. Leon had concluded his testimony, the Government called one Jean Manning Pate as a witness. Miss Pate testified that in June, 1955, she resided at 1902 37th Street, N. W., Washington, D. C., with a person named June Raines from whom she was renting. She said that at some time during that month, she saw the petitioner at the subject residence. She said that she, the petitioner and Miss Raines engaged in conversation. (R. 54-56) At this point, counsel for the petitioner sensing that the Government was about to elicit testimony from the witness that was objectionable, requested that counsel for the government approach the bench and proffer to the court what he proposed to establish by the witness. At the bench, counsel for the government made the following proffer:

> MR. McLAUGHLIN: I intend to show by this witness Your Honor, that in June of '55, Dr. Brown went to that address, as she has stated, and to her and to this Mrs. Raines, made an arrangement with them for the purpose of keeping girls over the weekend that he would send to her, who would have menstrual trouble, and that they were to pacify them and treat them, and all that, and if anything happened, they should get in touch with him.
>
> I am going to ask her if that happened, and if that arrangement continued up through September of '55; and she will say, yes. (R. 56)

Over objection of counsel for the appellant, the witness Pate testified nearly in accordance with the proffer made by counsel for the government at the bench. The witness testified that sometime during the month of June, 1955, the petitioner entered into an agreement with Miss Pate and Miss Raines, which, in substance, was: To send patients to their residence for care and attention; the patients would have minature labor pains. (R. 54-59)

On cross-examination, the witness Pate testified that no

patients were sent from the alleged agreement date and the date of commission of the offense alleged in the indictment. (R. 59-60, 62-63)

After the case had been concluded, the trial court began to instruct the jury with respect to the applicable law. (R. 125) In the course of instructing the jury, the court correctly pointed out that the statute under which the petitioner was charged contains two distinct offenses, namely: the procuring or producing of an abortion or miscarriage, and an attempt to procure or produce an abortion or miscarriage. (R. 132) Although the petitioner was only charged in the indictment with the procuring or producing of an abortion or miscarriage, the trial judge, nevertheless, instructed the jury that if they had a reasonable doubt as to whether the petitioner procured or produced a miscarriage upon Miss Stephenson, they could then pass to a consideration of the question of whether or not the petitioner attempted to procure or produce a miscarriage upon Miss Stephenson. (R. 132-139) At the conclusion of the court's charge, counsel for the petitioner objected to the court's instructions with respect to the statute.[3]

The petitioner was found guilty by the jury (R. 139); and sentenced by the court to a term of imprisonment of from two to eight years. (R. 5) From said judgment an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (R. 3) By judgment dated November 29, 1956, the Court of Appeals affirmed the judgment of the District Court. (R. 141) Thereafter, and seasonably, the petitioner petitioned the Court of Appeals for a re-hearing en banc. (R. 142) The petition for re-hearing was denied December 29, 1956. (R. 152)

REASONS FOR ALLOWING THE WRIT

The petitioner respectfully contends that this Honorable Court should allow this writ because:

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[3] Official transcript of proceedings, p. 657.

1. The judgment of the courts below that it was proper for the trial court to instruct the jury on attempt: (a) constituted such a departure by the trial court from the usual course of proceedings in a federal criminal trial, and an authorization of an departure by the court of appeals, as to amount to a denial of the petitioner's right to due process of law; (b) involved such a grave question in the administration of federal criminal justice as to warrant a determination as to its propriety by this Court—this question not having been previously determined by this Honorable Court; (c) conflicts with the decisions of other Federal Circuit Courts of Appeals and also notable decisions of state courts of last resort.

2. The judgment of the United States District Court convicting the petitioner of abortion and the judgment of the Court of Appeals affirming the conviction, where there was admitted into evidence against the petitioner testimony regarding an alleged agreement, conflicts with the decisions of other Circuit Courts of Appeals and other unmodified decisions of the Court of Appeals for the District of Columbia Circuit.

ARGUMENT

I

There are two ways by which the crime of abortion as defined by the District of Columbia Code may be committed. First, where a person by means of any instrument, medicine, drug, or other means whatever, procures or produces an abortion or miscarriage on any woman. Second, where a person by means of any instrument, medicine, drug, or other means whatever, attempts to procure or produce an abortion. D. C. Code, 1951 Ed., Supp. IV (1955) Section 22-201.

In the instant cause the petitioner was charged in a one count indictment with having committed the offense of abortion by the first method set out, to wit, by means of medicine and drugs he did procure and produce an abortion and miscarriage of Sylvia J. Stephenson. (R. p. 1) The petitioner was not charged with having committed the

offense of abortion as defined by the Code by the second method set forth in the statute; i.e., of attempting to procure or produce a miscarriage.

At the petitioner's trial in the United States District Court for the District of Columbia, the government's evidence showed that Sylvia J. Stephenson had aborted.[4] There was no evidence showing or tending to show that an attempted abortion had been committed.[5] Notwithstanding:

(1) that the indictment did not charge that the petitioner had violated the abortion statute by the method of attempting to procure or produce an abortion; and, (2) that there was no evidence in the record showing that the statute had been violated by the commission of an attempt; the court nevertheless instructed the jury that they could return a guilty verdict if they believed that the petitioner attempted to procure or to produce an abortion on Sylvia J. Stephenson.[6] (R. pp. 134-135, 138-139)

The petitioner contends that it constituted a denial of his right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution for the District Court to have instructed the jury about attempt where the indictment did not charge an attempt and where there was no evidence to support such an instruction.

Normally the attempt to commit a felony is a lesser

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[4] See record pages 22 and 46 to 47 where the complainant, and Arthur Ted Leon testified that on September 2, 1955, the complainant aborted in Mr. Leon's apartment.

[5] An attempt to commit a crime contains three elements; the intent; the performance of some act towards its commission; and, failure of consummation. Words and Phrases, permanent edition, vol. 4; Ballentine, Law Dictionary with Pronunciations, second edition; Wharton's Criminal Law, 11th ed., Vol. 1, p. 268 et seq.; Burdick, Law of Crime, vol. 1, Ch. 22, C.J.S. 137; 14 Am. Jr. 813; Lemke v. United States, 211 F2d. 73; cert. denied 347 U. S. 1013; U. S. v. Baker, 129 F. Supp. 684. The attempt to commit an offense is merged in proof of the completed offense. Wharton, supra, vol. 11, page 1059; People v. Cosad, supra; Gapion v. Com., 196 S. W. 2d. 744, 302 Ky. 867; State v. Baker, 276 S. W. 2d. 131 and case cited therein.

[6] This portion of the Court's instructions, about attempt, followed the court's instruction on procuring or producing an abortion.

offense than the felony,[7] and thus in the District of Columbia for some crimes the attempt to commit the offense is embraced in the offense, e.g., larceny, kidnapping, embezzlement and housebreaking. This means that in a prosecution for one of these felonies, where the indictment only charges the commission of the crime, the court may instruct the jury on the lesser offense of attempt. In fact Rule 31(c) of the Federal Rules of Criminal Procedure[8] impliedly authorizes such an instruction.[9] But the wording of the abortion statute precludes an instruction on an attempt to procure or to produce an abortion where the crime charged is the procuring or the producing of the abortion. Both the attempt and the commission are on the same plain; both are means by which the statute may be violated. Therefore, the attempt is not embraced in the act of procuring or producing the abortion; the statute makes them acts of equal quality and subject to the same punishment.

Where a statute makes different acts criminal and the accused is charged in an indictment with the violation of the statute by one of the means provided, the petitioner asserts that the case cannot, as here, be submitted to the jury on the theory that he is guilty of violating the statute in a manner different from that charged. Such a practice makes for a fundamental denial of due process of law, and is, moreover, flagrantly contrary to the concept of what is right in the administration of criminal justice. Its greatest evil is that the jury is authorized to convict upon a theory of guilt that has not been raised in the trial by either the allegations or the proof. The District Court's

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[7] Unless otherwise provided, Title 22-103; D. C. Code, 1951 ed. makes it a misdemeanor.

[8] "*Conviction of less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

[9] Provided there is evidence to support an instruction on: (a) attempt; Simpson v. U. S., 195 F.2d. 731; Small v. U. S., 153 F.2d. 144, (b) lesser included offense; Sparf v. United States, 156 U. S. 51; Goodall v. U. S., 180 F.2d. 397; Burcham v. U. S., 163 F.2d. 761; Marcus v. U. S. 86 F.2d. 854, 859.

instruction on attempt was tantamount to adding a count to the indictment.

Under the court's instructions, the jury returned a general verdict. It is impossible to determine upon which of the two theories that was submitted to the jury, a finding of guilt was made.

Petitioner contends that the practice that is complained of here does violence to his fundamental rights to due proces of law and to a fair trial, and that, without the showing of any additional prejudice, reversible error has been committed. This has been the view of all the cases that have considered the question. It should be noted that the question raised here is novel in the District of Columbia; and as far as counsel has determined has never been passed upon by this Honorable Court.

The case of *Novy* v. *State*, (1911) 138 S. W. 139, 62 Tex. Cr. R. 492, is illustrative of the universal view. There the appellant was charged in a two count information; the effect of which was to charge him with directly keeping a bawdy house where liquor was unlawfully sold and kept for sale by him. The information was drawn under a statute which, in the language of the Court—"There are, at least three separate and distinct offenses made". One is where the party who is charged directly for himself or as agent, or through an agent unlawfully keeps a bawdy house or a disorderly house. The second offense created by the statute is where the accused is concerned in keeping, or, assists, or abets the keeping of a bawdy house. The third offense under the statute is knowingly permitting the keeping of a bawdy house. The appellant, as above noted, was charged only with directly keeping a bawdy house; he was not charged with keeping it through an agent; or with knowingly permitting it to be kept by some one other than himself.

At the appellant's trial the Court instructed the jury that they could find the appellant guilty if they believed that the appellant violated the statute in any of the three

ways. On appeal, the court, in reversing the appellant's conviction said the following:

> "Several complaints were made of the charge of the court. We deem it unnecessary to notice but one, and that is that the court not only submitted to the jury the specific charge that was made against the appellant by the information, as hereinbefore explained, but that in addition thereto, he submitted the keeping of such house by the appellant through an agent and of knowingly permitting it to be kept . . . . This charge was excepted to by the appellant at the time it was given; the complaint thereof being that the Court not only submitted the question of whether the defendant directly kept or was concerned in keeping said house, but he also directly submitted, in addition thereto, if he kept it through any agent, or knowingly permitted it to be kept, the jury was authorized to find him guilty . . . ."
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> "It has long been the established doctrine that, when an offense is charged to have been committed in one way, it is error for the court, over the defendant's objections, to authorize the jury to convict, if the evidence shows that he violated the statute in some other way not charged in the information or indictment. Reid v. State, 9 Tex. App. 472; Kennedy v. State, 9 Tex. App. 400; Hunt v. State, 9 Tex. App. 404; Tooney v. State, 5 Tex. App. 163; Winzel v. State, 47 Tex. Cr. R. 267, 83 S. W. 187.
>
> "For this error alone the judgment in this case is reversed, and the case remanded."

In Randle v. State, 1882, 12 Tex. Cir. 250; the court in forceful language also enunciated the general rule of law, which as indicated, was set out in the *Novy* case above. The full opinion of the Court is as follows:

> "There are two modes by which the crime of adultery as defined by the Code may be committed. 1st. Where the man and woman live together and have carnal intercourse with each other. 2nd. Where they have habitual carnal intercourse with each other, without living together. See: Penal Code, art. 333.

"It is a rule of practice which obtains in criminal as well as civil actions that the allegations upon which the action is founded and the proof adduced must meet and correspond. It is a further rule well settled and established that, where a particular fact or circumstance is alleged as constituting or forming a part of the descriptive identity of the offense charged, the prosecution is held and limited to that particular state of facts in the proof adduced to establish the crime; and, further, the court in its charge to the jury is also limited to the matter charged as constituting the offense, and that to submit to the jury in the charge other matters constituting the offense which are not alleged is a radical and fundamental error, which will necessitate a reversal because this court cannot ascertain in such case whether or not the party may not have been convicted on matters not charged against him in the indictment or information. In other words, where the allegation is descriptive of the offense, the guilt of the defendant must be found, if at all, upon the ground alleged in the information or indictment.

"In the case before us the adultery is alleged in the information to consist in the fact that the parties unlawfully lived together and carnally knew each other. In the charge to the jury the court instructed them in substance that if they believed the parties had habitual carnal knowledge of each other, that would be sufficient, without proof of an actual living together. This charge was erroneous; 'and from the pertinency of this erroneous charge to the evidence, it cannot be regarded as an abstraction not affecting the trial of the cause' Coney v. State, 43 Tex. 414. On the contrary the charge was radically erroneous; and for this error the judgment is reversed and the cause remanded."

For other cases that have followed or declared the general law, see: State v. Berkendorf (1932) 10 P.2d. 1073, 1075; Garner v. State, (1921) 57 So. 502, 3 Ala. App. 161; State v. Reed (1907) 81 N. E. 571, 168 Ind. 588; Walker v. United States (1939) A. Cir. 104 F.2d. 456; United States v. Byers (1934) 2nd Cir.) 73 F.2d. 419; Malaga v. United States (1932 1 Cir.) 57 F.2d. 822.

The prosecutor in his opening statement to the jury stated that the petitioner had offered to Miss Stephenson and Mr. Leon, for a fee of $50.00 the facilities of a premises in Georgetown, Washington, D. C., where she might go and be attended to while in the course of aborting: Then by way, apparently, of contemplated corroboration he also told the jury in his opening statement that the petitioner did have such a place because he had entered into an agreement with one Miss Jean Pate and one June Raines, in June of 1955, to refer patients to their Georgetown residence. (R. p. 6, 8)

Counsel for the petitioner duly objected to these remarks on the ground that any testimony relating to such an agreement was inadmissable because it antedated the date of the offense. (R. p. 7) The court overruled the objection and held that the remarks were proper, and that the evidence was admissable to show, "the scheme and plan he /petitioner/ had for sending these people, after the abortion was performed." (R. p. 7)

It was known to the prosecutor beforehand that the petitioner had not sent anyone to the Georgetown residence between the date of the alleged agreement and the date of the offense charged in the indictment. It then appears that the strategem engaged by the prosecutor was designed and calculated for the purpose of prejudicing the petitioner. The contention of the government and the concurrence therein by the trial court that the prosecutor's remarks were proper and that the evidence was admissible on the theory of showing scheme or plan to commit the offense charged is legally untenable; and the subsequent admission of the witness Pates' testimony into evidence, prejudiced the petitioner, denied him a fair and impartial trial, and constituted a deprivation of the due process of law to which he was entitled—all in violation of his rights under the United States Constitution.

An examination of the witness Pate's testimony (R. p. 54-64) conclusively demonstrates the error of the court's

ruling and highlights the error committed when the court improperly admitted her testimony. The evidence was not of such character, quality and sufficiency as would permit its use to prove scheme or plan. Moreover, it was remote in point of time [10] and was lacking in probative value; it did not show what patients were referred, or that, in fact, there was anything illegal intended in the alleged agreement. Essentially, the evidence was not probative of the facts in issue.

The petitioner is not unmindful of the rule of law that makes evidence which is otherwise excludable, admissible for the purpose of showing scheme or plan on the part of the accused to commit the offense charged. However, this principle cannot be invoked merely to save the testimony of the witness Pate, when it is obvious that the evidence adduced did not satisfy the standards required by the rule.

The government contended that there was a continuing agreement between the petitioner, June Raines and Jean Pate, which commenced in June, 1955; under the terms of which, the petitioner was to send patients who had minature labor pains to the Raines-Pate residence to be cared for by them. The witness Pate testified to this. And, importantly, to nothing more.

Pates testimony could not and did not show design, plan or scheme. It was lacking in probative value, because it did not show that the agreement was to do an illegal act nor that it was related to the doing of the offense charged in the indictment. Consequently, the jury was left to preju-

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[10] The testimony and evidence disclosed that no one was sent to or referred to the Pate-Raines residence from the time of the alleged agreement (June) up to and including September 1, 1955, which was the date of the offense alleged in the indictment. (R. p. 59, 62) See Martin v. U. S., 75 U. S. App. D. C. 399 at p. 403 quoting Whiteman v. State, 1928, 119 Ohio St. 285, 164, N.E. 51, 63 A.L.R. 595:

"The mere fact that testimony is logically relevant does not in all cases make it admissible. It must also be legally relevant. A fact which in connection with other facts renders probable the existence of a fact in issue may still be rejected, if in the opinion of the judge and under the circumstances of the case it is considered misleading or too remote."

dicially infer that the agreement was an illegal one and then to further infer or presume that the illegal agreement so found was connected with the doing of the act charged in the indictment. This, the petitioner urges is resting a presumption or inference on a presumption or inference which is not legally permissible.

Even if there was an illegal agreement satisfactorily established, it did not erase the error. For admittedly no patient was sent to the Pate Raines residence pursuant to the agreement prior to the date of the alleged offense. It is difficult to perceive the connection or the relationship between the "scheme or plan" and the offense charged when it is considered that the requirement of the exception for the admissibility of the proof of separate offenses when the evidence shows scheme or plan, is that the scheme or plan is of probative value in proving the offense charged. (Wigmore on Evidence, 3rd Ed. Sec. 304, et seq.)

Courts have long been aware of the dangerous nature of evidence of the type and character here introduced through the testimony of the witness Jean Pate.

The United States Court of Appeals for the District of Columbia Circuit, speaking through the late Chief Judge Stephens, in his concurring opinion in Martin v. U. S., (1942) 75 App. D. C. 399, 127 F.2d. 865, said, in referring to Burge v. U. S., 26 App. D. C. 524, the following at page 402:

> "It is equally well settled that, subject to certain exceptions which will be referred to below, the Government cannot as part of its proof that a defendant is guilty of a crime charged, include evidence that he has committed another crime or crimes".
>
> "The exceptions, however, to this rule are few, and they are well stated in *People v. Molineux*, 168 N. Y. 264, 293, 61 N. E. 286, 62 L.R.A. 193, thus: 'Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) *a common scheme or plan embracing*

the commission of two or more crimes so related to each other that proof of one tends to establish the others; . . .

And at page 404 of the opinion the Chief Judge further said:

• • • •

"As appears from the Government's contention stated above the two exceptions which it is necessary to deal in the instant case are the so-called 'Common scheme or plan' exception and that referred to as the 'identity' exception. To bring a case within the former 'there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme or they must be so related to each other as to show a common motive or intent running through both.' *People* v. *Molineux,* 61 N.E. at 299. Underhill on Criminal Evidence (1st Ed. 1898) Section 88 puts it thus:

". . . Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received. *This connection must clearly appear from the evidence.* Whether any connection exists is a judicial question. If the court does not clearly preceive it, the accused should be given the benefit of the doubt, and the evidence rejected. The minds of the jurors must not be poisoned and prejudiced by receiving evidence of this irrelevant and dangerous description." Emphasis contained in the original citation.

The court in the Martin case (supra) at page 404 also significantly indicated that even in the instance where it is determined that the evidence is admissible as an exception, the factor of necessity should be considered. Moreover, the Court recognized the compelling need for cautionary instruction to the jury. In the case at bar none was given.

See also: *U. S.* v. *Klass,* 166 F. 2d. 373; *Hubby* v. *U. S.* 150 F. 2d. 165; *People* v. *Molineux,* 168 N. Y., 264,

293, 61 N. E. 286; 2 Wigmore on Evidence (3rd Ed. 1940) Section 304; *Railton* v. *U. S.*, 127 F. 2d. 691.

CONCLUSION

The petitioner respectfully urges that this writ should be allowed because the questions involved herein are important to the proper and orderly administration of federal criminal justice, and should therefore be determined by this Honorable Court. The decision of the Court of Appeals in this cause conflicts with the decisions of other Circuit Courts of Appeals and is contrary to the general law. This Honorable Court should grant this writ and hold (1) that the District Court erred in instructing the jury on attempt and (2) that it was error for the District Court to admit into evidence the testimony against the petitioner relating to the alleged agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 715

SCHLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 140) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1956 (R. 143). A petition for rehearing was denied on December 26, 1956 (R. 152). The petition for a writ of certiorari was filed on January 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under an indictment charging a completed abortion, the trial court properly charged the

jury that it could find petitioner guilty of an attempted abortion.

2. Whether the trial court properly admitted evidence that petitioner had an arrangement (not shown to have been utilized) whereby women would be taken care of at a home during periods of pain.

STATUTE INVOLVED

22 D. C. Code (1951 Ed., Supp. IV) 201 provides in pertinent part:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years * * *.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on an indictment charging that he procured and produced an abortion of a pregnant woman (R. 1, 139). He was sentenced to imprisonment for from two to eight years (R. 5). On appeal the conviction was affirmed *per curiam* (R. 140).

The evidence for the government was that a Miss Stephenson, after she learned that she was pregnant (R. 30–31, 70–71, 79), went to petitioner's office with a Mr. Leon (R. 11, 38). In a conversation with Mr.

Leon, petitioner agreed to perform an abortion for $300 (R. 39).

On September 1, 1955, Miss Stephenson and Mr. Leon, who had borrowed $300 from a bank (R. 14, 40), went to petitioner's office about 7 p. m. (R. 14–15, 40). Petitioner took Miss Stephenson into another room and inserted a paste in her uterus. (R. 16–19). Mr. Leon paid petitioner $300 (R. 42).

The next day, at Mr. Leon's apartment, Miss Stephenson had considerable pain. At about 7:30 p. m. she had sharp pains, then a feeling of relief followed by fainting (R. 20–23, 45). When she regained consciousness, she noticed tissue and blood (R. 23–24, 31). Mr. Leon also testified that he saw tissue and blood (R. 47).

Miss Stephenson subsequently went to another physician and received medical treatment at Georgetown hospital in October 1955 (R. 26–27, 93–96, 99). The Hospital physician testified that the clinical evidence was consistent with a recent incomplete abortion (R. 100).

Mr. Leon testified that, in his first conversation with petitioner, the latter said it would be advisable for Miss Stephenson to go to a home in Georgetown to wait for the treatment to take effect and recuperate for a few days (R. 39–40, 42). Mr. Leon said he would take care of her himself (R. 42). Over objection (R. 53), the government was permitted to introduce testimony that in June 1955 petitioner had made arrangements with two women living in Georgetown to take care of women patients who, as he put it, would have pains for approximately 10 hours

(R. 58–60). No patients were sent there before September 1 (R. 60).

Petitioner denied he had ever seen Miss Stephenson and Mr. Leon before his arrest and testified that he was not in Washington on September 1, 1955 (R. 113–117).

In submitting the case to the jury, the judge charged that, for the completed offense of abortion, there had to be proof beyond a reasonable doubt that the woman was pregnant and that the defendant procured an abortion (R. 134). He charged that if the jury had doubt as to whether the woman had a complete abortion, or that she was actually pregnant, it should consider whether defendant was guilty of an attempt under the statute. For such offense, he charged, it was immaterial whether the woman was in fact pregnant or did in fact abort, so long as the defendant believed she was pregnant and attempted to produce an abortion (R. 134). The jury returned a verdict of "guilty as charged" (R. 139).

ARGUMENT

The opinion of the Court of Appeals for the District of Columbia, relating to a local crime, presents no question warranting review by this Court. *Fisher* v. *United States,* 328 U. S. 463, 476.

1. Petitioner contends (Pet. 13) that it was error for the trial judge to submit the attempt issue to the jury since the indictment did not charge an attempt. Rule 31 (c) of the Federal Rules of Criminal Procedure, however, specifically provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

The District of Columbia statute under which petitioner was indicted specifically made an attempt to procure an abortion a crime.

The argument (Pet. 9–10) that the rule has no application to this statute because the attempt and the completed offense are subject to the same punishment has no merit. By its terms, Rule 31 (c) can apply only where an attempt is specifically made an offense. And in federal criminal law generally, when attempt is made an offense, it is common to have both the completed act and the attempt subject to the same maximum punishment, thus leaving the severity of the sentence to the discretion of the trial judge. (*E. g.*, 18 U. S. 486, 493, 507, 508, 542, 601, 751, 752, 754, 872, 1013, 1015(c), 1542, 1717, 2113).

The suggestion (Pet. 9) that there was no evidence to justify an instruction on attempt is also without merit. Petitioner's counsel had endeavored to inject into the case an issue as to the pregnancy of Miss Stephenson on the basis that the doctor's statement to her that she was pregnant was based on manual examination (R. 77–80, 103–104). Moreover, there was no direct testimony that a fetus had been passed. Petitioner moved for judgment of acquittal on the ground that the government had not proved pregnancy and had not proved an abortion (R. 107–108). On any theory, there was sufficient evidence from

which the jury could find that an attempt had been made. The instruction on attempt was therefore proper in relation to the evidence in the case.

2. The evidence as to petitioner's arrangement with the women in the Georgetown apartment was germane. Mr. Leon testified that, at his first interview with petitioner, with only the two of them present, petitioner suggested that Miss Stephenson go to a house in Georgetown (R. 39–40, 42). The fact that petitioner had arranged for this type of care was corroborative of Mr. Leon's testimony that petitioner agreed to perform, and subsequently did procure, an abortion. The basic issue in the case, of course, was the credibility of the government's witnesses measured against petitioner's offer of an alibi. Moreover, the fact that petitioner had an arrangement of the kind described (see the Statement, *supra*, pp. 3–4) was evidence of his scheme of operation and of his willingness to commit the crime of abortion, and therefore properly admissible on that ground. See I *Wigmore on Evidence* (3rd ed.), Section 83.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
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Warren Olney, III,
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Beatrice Rosenberg,
Attorney.

February 1957.

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